

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Petition of Verizon Telephone Companies</b>	)	
<b>for Forbearance Under 47 U.S.C. § 160(c) From</b>	)	<b>Docket No. 04-440</b>
<b>Title II and <i>Computer Inquiry</i> Rules With Respect</b>	)	
<b>To Their Broadband Services</b>	)	

**OPPOSITION OF COMPTel/ASCENT**

CompTel/ASCENT (“CompTel”) hereby submits its opposition to the Verizon Telephone Companies’ (“Verizon”) Petition for Forbearance from the application of *Computer Inquiry* and Title II rules to their broadband services. Verizon’s Petition echoes the arguments made by BellSouth in its October 27, 2004 Petition For Forbearance from the application of *Computer Inquiry* and Title II common carrier requirements to its broadband services (WC Docket No. 04-405) and requests the same relief requested by BellSouth. Rather than repeat its counterarguments here, CompTel incorporates by reference its December 20, 2004 Opposition to the BellSouth Petition, a copy of which is attached hereto.

CompTel is also compelled to point out the fallacy of Verizon’s assertions that the *Computer Inquiry* and Title II common carrier regulations “prevent” competition and inhibit it from introducing new offerings and responding to new offerings by rivals. (Petition at 14-15) In a press release issued just one month after it filed these statements with the Commission, Verizon made the following public representations regarding the success of its broadband offerings despite *Computer Inquiry* and Title II common carrier regulation:

Verizon added a net of 306,000 broadband DSL lines in the fourth quarter 2004 for a total of 3.6 million DSL lines in service, representing 1.2 million net additions over the past year – a growth rate of 53.5%.

Revenues from DSL contributed to total wireline data revenues of \$2.0 billion in the fourth quarter 2004, a 9.2% increase compared with \$1.9 billion in data revenues in the fourth quarter 2003. For the year, data revenues of \$7.8 billion grew 7.4% compared with 2003 and now represent more than 20 percent of total wireline revenues.

Even as strong DSL customer and revenue growth continue, Verizon has begun deploying FiOS next-generation, fiber-optic based broadband services. FiOS services currently have more than 20 percent market penetration in Keller, Texas, Verizon's first market, after the first four and a half months of sales.

● \* \* \*

Approximately 56 percent of Verizon residential customers have purchased local services in combination with either Verizon long distance or Verizon DSL or both. This compares with 43 percent in the fourth quarter 2003.

● \* \* \*

Approximately 4.4 million Verizon Freedom packages were in service to residential and business customers by year end 2004. Verizon Freedom plans help retain and win back customers by offering local services with various combinations of long distance, wireless and Internet access, available on one bill.

See News Release, "Verizon Reports Strong 4Q and 2004 Results, Driven By Wireless Revenue Growth, Solid Cash Flows and Margins," dated January 27, 2005.

<http://newscenter.verizon.com/proactive/newsroom/release.vtml?id+88979>.

For the reasons stated herein and in the attached Opposition to the BellSouth Petition, CompTel/ASCENT respectfully requests that the Commission deny Verizon's Petition For Forbearance from *Computer Inquiry* and Title II regulation.

February 8, 2005

Respectfully submitted,

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	)	
<b>Petition of BellSouth Telecommunications, Inc.</b>	)	
<b>for Forbearance Under 47 U.S.C. § 160(c) From</b>	)	<b>Docket No. 04-405</b>
<b>Application of <i>Computer Inquiry</i> and Title II</b>	)	
<b>Common Carriage Requirements</b>	)	

**OPPOSITION OF COMPTEL/ASCENT**

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December 20, 2004

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## **SUMMARY**

The Commission should deny BellSouth's Petition For Forbearance from enforcing the *Computer Inquiry* and Title II common carrier regulations for broadband transmission services. In addition to the fact that the Petition is premature, BellSouth has failed to make even a minimal showing that the three preconditions for forbearance relief set forth in Section 10 of the Act have been satisfied.

The very issues that BellSouth asks the Commission to deal with through forbearance are before the Commission in a pending rulemaking proceeding. *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (released February 15, 2002). The extensive record that has been developed in the rulemaking docket should be the basis for the Commission's decision on these important issues rather than BellSouth's allegations that the existence of competition from cable modem providers in the retail broadband market should translate into a license for it to deny its customers broadband access to competing ISPs and VOIP providers. Moreover, BellSouth's reliance on the Commission's *Cable Modem Decision* to argue that it should be freed from *Computer Inquiry* and Title II common carrier regulations is misplaced. The Ninth Circuit has vacated the Commission's *Cable Modem Decision* to the extent it classifies cable modem service as an information service. Until and unless the Supreme Court reinstates the Commission's decision, BellSouth's disparate treatment assertions are without foundation.

BellSouth falls far short of making a convincing showing that forbearance from enforcing *Computer Inquiry* and Title II common carrier regulations will promote

competitive market conditions and enhance competition. Despite its contention that it does not have market power in the broadband market, BellSouth continues to maintain control of bottleneck transmission facilities that competing ISPs and VOIP providers need to reach their customers. Relieving BellSouth of the obligation to make the transmission component of its broadband services available to competing ISPs and VOIP providers at just, reasonable and nondiscriminatory rates, terms and conditions, will allow BellSouth to deny access to its competitors altogether, raise prices without restraint, and/or discriminate in favor of its own ISP on price and in the quality of service provided. None of these likely outcomes will promote a competitive market for Internet access service or enhance competition for such service.

Retention of the *Computer Inquiry* and Title II common carrier regulations for broadband transmission services is necessary to protect consumers by ensuring that they maintain the ability to choose an ISP or VOIP provider other than BellSouth. It is also necessary to preserve nondiscriminatory access to broadband transmission facilities for competing ISPs and VOIP providers.

The Commission should give little or no weight to BellSouth's invocation of Section 706 as an additional basis for granting forbearance. While BellSouth complains here that the *Computer Inquiry* and Title II common carrier regulations dampen its incentives to invest in new technologies and inhibit broadband innovation and deployment, it has assured investors that it is continuing to expand its network capabilities to maintain a leadership position in the broadband market and is actively deploying new broadband/IP platforms.

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<b>Common Carriage Requirements</b>	)	

**OPPOSITION OF COMPTEL/ASCENT**

CompTel/ASCENT (“CompTel”) hereby submits its opposition to BellSouth Telecommunications, Inc.’s (“BellSouth”) Petition for Forbearance from the application of *Computer Inquiry* and Title II common carriage requirements to its broadband transmission service. Not only has BellSouth jumped the gun in filing its Petition, it has also failed to meet its burden of showing that all of the prerequisites for forbearance have been satisfied and that it is entitled to the relief requested. The Commission must, therefore, deny the Petition.

**I. BellSouth’s Petition Is Premature**

BellSouth seeks to be relieved of the obligations to offer pursuant to tariff the transmission component of its bundled Internet access service to unaffiliated information service providers (“ISPs”) and to purchase the transmission component of its bundled retail Internet access service pursuant to the same tariffed terms and conditions that are offered to unaffiliated ISPs. The question of whether government intervention continues to be necessary or appropriate to ensure that unaffiliated ISPs have nondiscriminatory

access or any access whatsoever to BellSouth's transport facilities is squarely at issue in a pending Commission rulemaking proceeding. *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (released February 15, 2002). In requesting forbearance at this time, BellSouth is attempting an end run around the Commission's rulemaking where a full record already has been developed on the implications for nondiscriminatory access and other core communications policy objectives of removing Title II and *Computer Inquiry* regulation. Rather than prematurely force a determination as to whether forbearance is warranted regardless of the outcome of the rulemaking, the Commission should dismiss BellSouth's Petition with an invitation to refile, if necessary, once the rulemaking is concluded and a decision issued.

BellSouth's Petition is premature for another reason. BellSouth relies extensively on the Commission's determination that cable modem providers<sup>1</sup> are not subject to *Computer Inquiry* and Title II regulation as the basis for granting it forbearance from those same requirements. (Petition at 4-6, 20-21, 27) The Commission's cable modem determination was premised on its conclusion that "cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs." *Cable Modem Decision* at ¶33. The Ninth Circuit, however, vacated that portion of the Commission's declaratory ruling holding that cable modem service does not include a telecommunications service offering. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Circ. 2003). On December 3, 2004, the Supreme Court granted *certiorari* of the

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<sup>1</sup> *In the matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-07 (released March 15, 2002) ("*Cable Modem Decision*").



*Brand X* decision. *Federal Communications Commission v. Brand X Internet Services* Docket No. 04-281 (*cert. granted* December 3, 2004). If the Supreme Court affirms the Ninth Circuit's conclusion regarding the telecommunications service component of cable modem service, cable modem providers will be required to allow competing ISPs access to their transport facilities for the provision of Internet access service, just as wireline carriers are required to do today. Such a result would gut BellSouth's disparate treatment arguments. In light of the current state of uncertainty with respect to the regulatory classification of cable modem service, it would be premature and presumptuous for the Commission to deregulate BellSouth's broadband transmission service under the guise of establishing a "level playing field" with cable modem providers. The Commission should refrain from any action on forbearance pending a decision from the Supreme Court in the *Brand X* case.

## **II. The Statutory Standards For Forbearance Have Not Been Met**

BellSouth bears a heavy burden in proving that it meets the requirements to obtain forbearance from the *Computer Inquiry* and Title II regulation of its broadband transmission services. Section 10(a) of the Act, 47 U.S.C. §160, provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make affirmative determinations that (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision or regulation is not

necessary for the protection of consumers; *and* (3) forbearance from applying such provision or regulation is consistent with the public interest. In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest.

BellSouth has failed to meet its burden of demonstrating that grant of its Petition to forbear from applying the *Computer Inquiry* and Title II common carrier regulations to its broadband transmission services would satisfy each prong of Section 10(a). On the contrary, forbearance would not promote competitive market conditions or enhance competition, would not preclude BellSouth from denying its ISP competitors access to its transmission facilities or charging unjust or unreasonable rates therefore, and would harm consumers. Accordingly, the Commission must deny BellSouth's Petition.

**A. Granting BellSouth Forbearance From *Computer Inquiry* And Common Carrier Requirements Will Not Serve The Public Interest**

The Commission has previously granted BellSouth substantial relief from the obligation to share its broadband network with facilities-based wireline competitors. In the Triennial Review Order, the Commission found that competitive local exchange carriers are not impaired without access to line-sharing, fiber to the home ("FTTH") loops and the packetized functionality and fiber optic portions of hybrid loops. In so finding, the Commission eliminated BellSouth's duty, pursuant to Section 251(c) of the Communications Act, to make such loops, as well as the high-frequency portion of copper loops used to provision DSL service, available to CLECs on an unbundled basis at

cost-based rates. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order On Remand And Further Notice of Proposed Rulemaking, FCC 03-36 (released August 21, 2003) at ¶¶ 248, 273, 288. On reconsideration, the Commission clarified that the definition of FTTH loops includes fiber loops serving primarily residential multiple dwelling units. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, FCC 04-191 (released August 9, 2004).

Just a week before BellSouth filed its Petition For Forbearance, the Commission granted BellSouth's Petition For Reconsideration of the Triennial Review Order and concluded that CLECs are also not entitled to fiber to the curb (FTTC) loops on an unbundled basis at cost-based rates. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Reconsideration, FCC 04-248 (released October 18, 2004).

Finally, on October 27, 2004, the Commission granted BellSouth's Petition For Forbearance from applying the independent Section 271 unbundling obligations to FTTH loops, FTTC loops and the packetized functionality of hybrid loops. *In the Matter of BellSouth Telecommunications, Inc. Petition For Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 04-48, Memorandum Opinion and Order, FCC 04-254 (released October 27, 2004).

Having been freed of any unbundling obligations for its next generation fiber transmission facilities to the detriment of CLECs, BellSouth now seeks to go a giant step further. With the removal of the *Computer Inquiry* and Title II common carrier

regulations for all of its broadband services, BellSouth will not only be able keep CLECs at bay in the broadband market, but also will be able to refuse competing ISPs, including voice over Internet protocol (VOIP) providers, access to its broadband transmission facilities, if it so desires. Such a result would be inconsistent with Commission's reasoning in the Triennial Review Order and would significantly impede the ability of VOIP providers and other ISPs that do not own their own transmission facilities from reaching their customers. Under these circumstances, the Commission cannot possibly find that forbearance will promote competitive market conditions and enhance competition.

In the Triennial Review Order, the Commission found that its FTTH policy would not adversely affect CLECs "because they can continue to use resale as a means for serving mass market customers after the ILECs deploy FTTH loops." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order On Remand And Further Notice of Proposed Rulemaking, FCC 03-36 (released August 21, 2003) at ¶279. If the Commission grants forbearance, BellSouth will not be required to tariff stand alone FTTH loops and there will be nothing for CLECs to resell. Section 251(c)(4) of the Act limits the resale obligation of incumbent LECs to telecommunications services that the carrier provides at retail to subscribers that are not telecommunications carriers. Forbearance from applying the *Computer Inquiry* and Title II common carrier requirements to FTTH loops would eradicate the ability of CLECs to resell such loops to mass market customers and remove the factual underpinning for the Commission's determination that CLECs would not be adversely affected by the "no unbundling" FTTH

policy. Forbearance would also allow BellSouth to foreclose competing ISPs and VOIP providers from access to such next generation loops and therefore access to their customers. Without the “last mile” connection, competing ISPs and VOIP providers would be unable to offer customers access to Internet content and services.

Aside from cutting off CLECs’ access to next generation loops for mass market customers, granting forbearance from the *Computer Inquiry* and Title II common carriage requirements would also enable BellSouth to deny competing ISPs and VOIP providers access to the DSL loops they use today to serve their customers. By doing so, BellSouth could wipe out the competition it currently faces and ensure that its customers have one and only one ISP option: BellSouth.

In order to meet the public interest forbearance criterion, the Commission has ruled that a petitioner must explain how the benefits of a regulation can be attained in the event of forbearance. *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, CC Docket No. 98-65, Memorandum Opinion and Order, FCC 99-215 at ¶ 7 (released August 31, 1999). This BellSouth has not even attempted to provide such an explanation, nor could it.

In *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, FCC 01-98 (released March 30, 2001), the Commission reiterated the non-discrimination objective of the *Computer Inquiry* requirement that incumbents that bundle telecommunications services with enhanced services offer the telecommunications service component separately:

There is no dispute in the record that the BOCs and all incumbent LECs are required to offer basic local exchange service on an unbundled, tariffed,

nondiscriminatory basis. . . . Customers would therefore be able to purchase enhanced services from competitive providers and still obtain local service from the incumbent pursuant to the tariff. This prevents the incumbent carriers from discriminating against customers who purchase enhanced service from competitive suppliers. . . . [T]he separate availability of the transmission service is *fundamental* to ensuring that dominant carriers cannot discriminate against customers who do not purchase all of the components of a bundle from the carriers themselves.

at ¶44 (emphasis added). BellSouth's Petition is devoid of any showing that the benefits of the *Computer Inquiry* requirements, which the Commission has described as fundamental to preventing discrimination against customers who purchase ISP service from an unaffiliated provider, will be met in the event of forbearance. Instead, it asserts simply that it has "a strong economic incentive to maximize the utilization of its broadband capacity" and that "if permitted to do so, it *might* seek to negotiate private carriage arrangements that would be tailored to the unique circumstances of particular ISPs." (Petition at 28, emphasis added)

The Commission should not accept such speculative assurances as sufficient to meet the public interest criterion of Section 10(a). This is especially so in light of BellSouth's history of doing for competitors only what it is absolutely required. In its most recent Annual Report, BellSouth again confirmed that it refuses to sell its DSL service to customers who subscribe to a third-party carrier's voice service because this Commission does not obligate it to do so.<sup>2</sup> Nonetheless, BellSouth asks the Commission to accept on faith alone that if it is freed from the obligation to provide the transmission component of its broadband services on a stand-alone and nondiscriminatory basis to

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<sup>2</sup> BellSouth Telecommunications, Inc. Annual Report for the year ending December 31, 2003 at 8. <http://www.sec.gov/Archives/edgar/data/732713/000095014404001649/g86981e10vk.htm>. See also, *In the Matter of Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance for provision of In-Region, InterLATA Service in Georgia and Louisiana*, CC Docket 02-35, Memorandum Opinion and Order, FCC 02-147 (released May 15, 2002) at ¶¶ 157-158.

unaffiliated ISPs, including VOIP providers, competing ISPs and VOIP providers would still be able to obtain from BellSouth the inputs they need to provide competing broadband Internet access services. As the Commission has previously, found, application of the Section 10(a) criteria “is no simple task and a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met.” *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 To Certain Activities*, CC Docket 96-149, Memorandum Opinion and Order , DA98-220 at ¶16 (released February 6, 1998). The Commission cannot find that the non-discrimination objectives of the *Computer Inquiry* requirements will be met in the event of forbearance on the basis of BellSouth’s acknowledgment that it “might” seek to enter private carriage agreements with competing ISPs.

Even assuming, *arguendo*, that BellSouth continued to allow competing ISPs and VOIP providers to purchase DSL or other broadband transmission services as an input component to their high speed Internet access services, in the absence of *Computer Inquiry* and Title II regulation, there will be no limits on the prices BellSouth can charge for those transmission facilities and no avenue for potential purchasers to challenge those prices.<sup>3</sup> Because it is also a provider of ISP services, BellSouth would have every incentive, as well as the ability, to significantly raise the rates it charges competing ISPs and VOIP providers and drive those competitors out of the market.

In a similar context, the Commission has made clear that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is

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<sup>3</sup> The lawfulness of tariffed rates, terms and conditions can be challenged pursuant to Section 204 of the Act, 47 U.S.C. §204.

likely to lead to an increase in prices for wholesale inputs that competitors need to serve their customers. *See In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order in CC Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶63 (released December 30, 1999) where the Commission found as follows:

Specifically, we find that forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.

Relying on this precedent, the Commission is compelled to conclude that forbearance from the *Computer Inquiry* and Title II requirements will not promote competitive market conditions because the result of forbearance would be higher costs for competitive ISPs and VOIP providers that could impair their ability to enter and compete in BellSouth service territories.

BellSouth erroneously contends that in the Cable Modem proceeding, the Commission characterized the *Computer Inquiry* obligations as requiring “‘radical surgery.’” (BellSouth Petition at 13)<sup>4</sup> In fact, what the Commission stated was that unlike traditional wireline common carriers that provide telecommunications services separate from their provision of information services, cable modem service providers offer subscribers a single “integrated combination of transmission and the other

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<sup>4</sup> Citing *In the matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-07 (released March 15, 2002) at ¶ 43.



components of cable modem service.”<sup>5</sup> The Commission further noted that “cable modem service is not itself and does not include an offering of telecommunications service to subscribers.”<sup>6</sup> Thus, the “radical surgery” that the Commission found would be needed was not to the *Computer Inquiry* requirements, as BellSouth asserts, but rather to cable modem service if providers were required to extract the telecommunications service inside every information service and make the telecommunications service a stand alone offering. In any event, as noted above, the Ninth Circuit has vacated the Commission’s determination that cable modem service does not have a telecommunications service component so the “radical surgery” characterization even for cable modem service is very much open to question and should not be used as a basis for granting BellSouth’s Petition.

**B. BellSouth Has Not Shown That The *Computer Inquiry* and Title II Regulations Are Not Necessary To Prevent Discrimination**

BellSouth contends that intermodal competition<sup>7</sup> from cable modem providers will ensure that its broadband charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory absent enforcement of the *Computer Inquiry* and Title II regulations. (Petition at 17-20) Competition existing in the form of a duopoly would not be sufficient to constrain BellSouth’s prices

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 39. The Ninth Circuit vacated the Commission’s finding that cable modem service does not include an offering of telecommunications service. *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Circ. 2003), *cert. granted*, 04-281 (December 3, 2004).

<sup>7</sup> BellSouth also points to competition from wireless ISPs, citing the Comments of the License-Exempt Alliance in *Revision of Parts 2 and 15 of the Commission’s Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, ET Docket No. 03-122, filed September 3, 2003. (Petition at 11 and n. 37). Significantly, those comments also state that in virtually all cases, wireless ISPs were created because “incumbent wire providers were offering little or no broadband service to their customers.” Comments at 3. Allowing BellSouth to monopolize the ISP market could lead to a similar situation.

to end users. Nor will cable competition afford competing ISPs and VOIP providers access to the transmission component they need to deliver service to BellSouth's end users.

The Ninth Circuit correctly found that “cable-owned or cable-affiliated ISPs – unlike most dial up and many DSL ISPs – essentially own the ‘last mile’ (i.e., the connection between the headend and the subscriber’s home), giving them the power to restrict other ISPs’ access to cable subscribers.” *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9<sup>th</sup> Circ. 2003). The power to restrict competing ISPs’ and VOIP providers’ access to BellSouth’s subscribers is what the *Computer Inquiry* and Title II requirements are designed to prevent. Once those requirements are removed, BellSouth can effectively eliminate competition for its ISP and VOIP services. Even if BellSouth continues to provide unaffiliated ISPs and VOIP providers access to the transmission component, elimination of the *Computer Inquiry* requirements will remove the restrictions on BellSouth’s ability to discriminate in favor of its own ISP and VOIP service in terms of price and quality of service. Competition from cable modem providers cannot thwart such discrimination.

In a December 6, 2004 press release, BellSouth described itself as “one of the leading Internet Service Providers (ISPs) in the Southeast” and announced that it was providing service to more than 2 million DSL Service Customers and an additional 1 million BellSouth® Dial Internet Service Subscribers.<sup>8</sup> By denying unaffiliated ISPs access to its transmission facilities, BellSouth will easily be able to take by default the customer bases of the independent ISPs who currently provide Internet access service

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<sup>8</sup> [http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=48307&Proactive\\_ID](http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=48307&Proactive_ID) (December 6, 2004).

using BellSouth DSL facilities. Under these circumstances, customer defections could not be attributed to BellSouth's more efficient or higher quality service, but rather to a lack of alternatives.

BellSouth erroneously contends that forbearance from Title II common carrier requirements is warranted because it does not have market power in broadband transmission. (Petition at 29-30) Regardless of the extent of competition in the retail market for broadband services, BellSouth retains a bottleneck monopoly over access to end users who subscribe to its local exchange service. In an analogous situation, the Commission found that although the retail long distance market is fully competitive, the access market is not structured in a manner that allows competition to discipline rates:

Sprint and AT&T persuasively characterize both the terminating and originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user. Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXC's wishing to complete calls to, or carry calls from, that end user.

*In the Matter of Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (released April 27, 2001) at ¶ 30.

As is the case with all local exchange carriers, BellSouth controls an essential component – the transmission component -- of the system that provides its customers broadband Internet access. The transmission component is a bottleneck for unaffiliated ISPs and VOIP providers wishing to deliver Internet access service to BellSouth customers. BellSouth has both the ability and the incentive to abuse its market power over the transmission component needed to reach broadband customers. Just as the Commission determined that action was necessary to prevent CLECs from exploiting

their market power in the rates they charge for switched access service,<sup>9</sup> action is also necessary to prevent BellSouth from exploiting its market power in the rates it charges competing ISPs and VOIP providers for access to customers. Continuing to enforce the *Computer Inquiry* and Title II common carrier regulations is the action that is necessary.

**C. Retaining The *Computer Inquiry* And Title II Common Carrier Regulations Is Necessary to Protect Consumers**

Enforcement of *Computer Inquiry* and Title II common carrier regulation also remains necessary to protect consumers and BellSouth has not shown otherwise. BellSouth's primary argument for jettisoning the requirements is that they harm consumers by raising costs. BellSouth estimated that last year, it spent \$3.50 per customer per month to comply with the *Computer Inquiry* requirements for broadband customers. (Petition at 5, 21) As an example of the kinds of costs it incurs in complying with the *Computer Inquiry* requirements, BellSouth details the delays it encountered and the many tariff changes it was required to make in developing its Regional Broadband Aggregation Network ("RBAN") product to respond to the interest expressed by one ISP "in purchasing a more efficient broadband information service arrangement that included regional traffic aggregation and protocol conversion." (Petition at 22-23)

While BellSouth's responsiveness to customer demands is impressive, nothing in the *Computer Inquiry* requires BellSouth to develop or tariff new products at the request of "one ISP." On the contrary, the *Computer Inquiry* regulations simply require BellSouth to unbundle and offer on a stand alone tariffed basis the transmission component of its own bundled information services. Whether to make changes in those

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<sup>9</sup> *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (released April 27, 2001) at ¶ 34.

tariffed offerings is a matter within BellSouth's discretion and is not a function of the *Computer Inquiry* regulations. What the *Computer Inquiry* regulations require BellSouth to do is purchase the transmission component on the same tariffed terms and conditions as it is offered to non-affiliated ISPs. To the extent that BellSouth wants to upgrade the transmission component of its own information service offerings, competitive ISPs that buy the upgraded offering share with BellSouth the costs incurred in making any necessary tariff revisions. Rather than harm consumers, these costs are simply the price that must be paid for end users to have a choice of ISPs and for ISPs unaffiliated with BellSouth to have access to the transmission component they need to reach BellSouth customers.

BellSouth also complains that the *Computer Inquiry* regulations harm consumers by preventing ILECs from providing tailored broadband offerings that respond to consumers' specific needs. (Petition at 21, 32) This is inconsistent with its earlier assertion that it devoted considerable time and effort to the development of its RBAN product despite the fact that only one ISP had expressed an interest "in purchasing a more efficient broadband information service arrangement that included regional traffic aggregation and protocol." (Petition at 22)

The *Computer Inquiry* and Title II regulations protect consumer end users by ensuring that they have a choice of ISPs and protect consumer ISPs by ensuring that they are able to purchase the transmission facilities needed to provide Internet access services at just and reasonable rates and on the same tariffed terms and conditions as BellSouth. As noted above, in the absence of these regulations, BellSouth could deny competing ISPs and VOIP providers access to an essential component of their Internet

access service and run them out of business. Even if BellSouth continued to sell the transport component to its ISP and VOIP competitors, it could do so at significantly higher rates than it charges its own ISP and provide service at a level of quality much inferior to what it provides its own ISP, actions that would seriously undermine competition.

Although BellSouth states that it has every incentive to negotiate network access arrangements with competing ISPs (Petition at 28), without the regulations in place, nothing would stop BellSouth from offering “take it or leave it” deals incorporating terms that would make it difficult, if not impossible, for competing ISPs and VOIP providers to survive. BellSouth recently noted that grant of its Petition “would not reduce competition” because “more than 90 percent of DSL users in BellSouth’s area are BellSouth retail customers and only 10 percent are served by other ISPs.”<sup>10</sup> Contrary to BellSouth’s assertion, forbearance could very well eliminate the tiny toehold competitive ISPs have been able to acquire in the Internet access market. Consumers deserve better.

Enforcement of the *Consumer Inquiry* and Title II common carrier regulations remains necessary to preserve consumer choice in ISPs and competitive ISP access to the transmission facilities they need to reach their customers. The Commission should deny BellSouth’s Petition on the grounds that it has failed to come forward with evidence that would allow the Commission to find that continued enforcement of the regulations is not necessary to protect consumers.

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<sup>10</sup> “BellSouth Petition To FCC Threat to VOIP, Says Pulver”  
<http://www.x-changemag.com/hotnews/4bh19114724.html>.

### III. Section 706 Does Not Compel Forbearance

Finally, BellSouth contends that that the *Computer Inquiry* and Title II common carrier regulations dampen its incentives to invest in new technologies, reduce its willingness to innovate and invest in future enhanced service offerings, and inhibit broadband innovation and deployment. (Petition at 4, 6, 22-26, n. 82) For these reasons, it argues that Section 706, which directs the Commission to use forbearance authority to remove barriers to infrastructure investment and encourage the deployment of advanced services, mandates the grant of its Petition. (Petition at 16-17)

BellSouth's representations here are at odds with statements in its SEC filings touting the steps it has taken and is taking to expand its presence in the broadband market. There is no indication in BellSouth's SEC filings that the *Computer Inquiry* or Title II requirements have hampered its infrastructure investment or deployment of advanced services. In its 2003 Annual Report, BellSouth stated as follows:

Our business strategy is to solidify BellSouth as the leading choice of customers in the southeast for an expanding array of voice, data and Internet services . . . . We intend to

- become the leading provider of local broadband/Internet Protocol (IP) services in the southeast by deploying new broadband/IP platforms that support both voice and data services as well as applications.<sup>11</sup>

\* \* \*

As use of the Internet grows and as corporate data applications increase in sophistication and scope, the market for broadband and data services is expanding and evolving. BellSouth will continue to expand its capabilities in order to maintain a leadership position in the broadband and data communications market. Investment in service infrastructure is strategically managed to enable delivery of services offering increased capacity and functionality. In parallel, we continue to use new advances in digital technology to bolster the broadband capability of our

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<sup>11</sup> BellSouth Telecommunications, Inc. Annual Report for the year ending December 31, 2003, at 4-5. <http://www.sec.gov/Archives/edgar/data/732713/000095014404001649/g86981e10vk.htm>

entire network. The emergence of high performance broadband digital infrastructure offers the ability to use these networks for real time communications including voice and video using various technologies such as softswitches (software-based switching platforms) and voice over Internet protocol (VOIP).<sup>12</sup>

\* \* \*

We continue to deploy DSL products. In 2004 BellSouth expects to begin offering a higher speed version of FastAccess® that will have download speeds of up to 3Mbps.<sup>13</sup>

BellSouth's statements to the SEC and investors that it will continue to expand its broadband capabilities to maintain a leadership position in the market, will continue to invest in infrastructure to expand its network capacity and enhanced service offerings, and will continue to use new advances in digital technology to bolster the broadband capabilities of its entire network belie its complaints to this Commission that compliance with the *Computer Inquiry* and Title II requirements dampen its incentives to invest in new technologies, reduce its willingness to innovate and invest in future enhanced service offerings, and inhibit broadband innovation and deployment. BellSouth can't have it both ways. The Commission should give no weight to BellSouth's assertion that forbearance is necessary pursuant to Section 706 to remove barriers to infrastructure investment and encourage the deployment of advanced services.

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<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 6.



## **CONCLUSION**

For the foregoing reasons, CompTel/ASCENT respectfully requests that the Commission deny BellSouth's Petition For Forbearance.

December 20, 2004

Respectfully submitted,

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